U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: (2/20/99)

Case No.: **1998 INA 184**

In the Matter of:

PRISCO'S VIDEO TV & APPLIANCE, INC., Employer,

on behalf of

TARYN R. SIMOES, Alien.

Appearance: E. S. David, Esq., of New York, New York, for the Employer and Alien
Certifying Officer: Delores DeHaan, Region II.

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of TARYN R. SIMOES, ("Alien") by PRISCO'S VIDEO TV & APPLIANCE, INC., ("Employer") under § 212(a) (5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act") and the regulations promulgated thereunder, 20 CFR Part 656.[1] After the Certifying Officer ("CO") of the U.S. Department of Labor at New York New York, denied the application, the Employer requested review pursuant to 20 CFR § 656.26.

An alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa under § 212(a)(5) of the Act, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the *Dictionary of Occupational Titles*, published by the Employment and Training Administration of the U. S. Department of Labor.

sufficient workers who are able, willing, qualified, and available at the time of the application \and at the place where the alien is to perform such labor; and (2) the employment of the Alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the state employment security agency and by other reasonable means to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

Application. On May 22, 1995, the Employer applied for alien employment certification on behalf of the Alien to fill the position of "Secretary" in its Appliance Store. The position was classified as "Secretary under DOT Occupational Code No. 201.362-030[2]. Employer described the Job Duties as follows:

> Performs secretarial duties. Schedule appointments. Gives information to callers. Reads and routes incoming mail. Takes dictation and transcribe notes on typewriter. Composes and types routine correspondence. Computer inventory, and type statistical reports for appliance store.

AF 40. The Employer's qualifications were high school and two years of experience in the Job Offered. The Other Special Requirements were "Must type Min. 50 WPM." *Id*. This was a forty hour a week job from 9:30 AM to 5:30 PM, at a salary of $12.52 per hour with overtime, "if needed," at $18.78 per hour. *Id*.[3] Although twelve U.S. workers applied for the job, the Employer did not hire any of the candidates. AF 50-119.

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[2] 201.362-030 **SECRETARY (clerical)** alternate titles: secretarial stenographer. Schedules appointments, gives information to callers, takes dictation, and otherwise relieves officials of clerical work and minor administrative and business detail: Reads and routes incoming mail. Locates and attaches appropriate file to correspondence to be answered by employer. Takes dictation in shorthand or by machine [STENOTYPE OPERATOR (clerical) 202.362-022] and transcribes notes on typewriter, or transcribes from voice recordings [TRANSCRIBING -MACHINE OPERATOR (clerical) 203.582-058]. Composes and types routine correspondence. Files correspondence and other records. Answers telephone and gives information to callers or routes call to appropriate official and places outgoing calls. Schedules appointments for employer. Greets visitors, ascertains nature of business, and conducts visitors to employer or appropriate person. May not take dictation. May arrange travel schedule and reservations. May compile and type statistical reports. May oversee clerical workers. May keep personnel records [PERSONNEL CLERK (clerical) 209.362-026]. May record minutes of staff meetings. May make copies of correspondence or other printed matter, using copying or duplication machine. May prepare outgoing mail, using postage-metering machine. May prepare notes, correspondence, and reports, using work processor or computer terminal. *GOE: 07.01.03 STRENGTH: S GED: R4 M3 L4 SVP: 6 DLU:89*

[3] The Alien is a National of India, where she was born 1967. She attended college and other programs and in business and secretarial studies from 1971 to 1988.. The Alien worked as hotel secretary from 1985 to 1989, and she worked for the Employer from 1990 to the date of application. AF 37-38.

Notice of Findings. On October 6, 1997, the Certifying Officer (CO) issued a Notice of Findings ("NOF") proposing to deny certification. AF 125-127. The CO found the application was not in compliance with 20 CFR §§ 656.20(c)(8), 656.21(b)(6) and 656.24(2)(ii), and concluded that it failed to conduct a good faith recruitment effort under the Act and regulations. The NOF noted that the Employer's recruitment report indicated it rejected twelve U.S. workers, of which six were at issue. Employer's recruitment report said it rejected Ms. Bond, Ms. Foster, Ms. Fraser, Ms. Jimenez, Ms. Phillips, and Ms.Vallandares on grounds that they did not respond to its letter acknowledging receipt of their resumes and scheduling an interview, *i.e.*, "because they did not show up for interview." First, the NOF commented, the certified mail letters asked the applicant to call only if not interested, but extended no invitation to reschedule. The CO inferred from the envelopes of letters that were returned "unclaimed" that all letters sent bore the name and address of Employer's attorney as the return address, and all of the signed receipts found in the record were sent to the lawyer's office. Second, the NOF inferred, seeing counsel's name and address on the certified mail envelopes discouraged applicants from responding. Third, the tone and content of the letters indicate that, in addition to these factors, the Employer did not conduct a the recruitment in good faith, observing that all six of the above-listed applicants appeared qualified for the position on the basis of their resumes. Quoting 20 CFR § 656.20(b)(3), which stated, "[I]t is contrary to the best interests of U. S. workers to have the ... attorneys for the alien participate in interviewing or considering U.S. workers for the job offered the alien," the NOF found that, "Envelopes showing the attorney's name and address as the return address gives the appearance that the lawyer is involved in the recruitment process and puts a damper on that process in applicants' minds. The attorney in this case is an immigration attorney who does not normally interview applicants for positions not involving aliens." The CO then set forth the evidence Employer must file to rebut the preliminary findings stated in the NOF.

Rebuttal. The Employer's rebuttal was filed on October 14, 1997. AF 129. The rebuttal consisted of a letter by counsel, who stated the Employer's argumentative response to the NOF. In closing the Employer reasoned,

> As per persons not showing up for interview, one can clearly state that they are unqualified as they did not show up which means they were not interested.

Final Determination. The CO's Final Determination of November 10, 1997, denied alien labor certification. AF 130-132. After reviewing the NOF with the rebuttal and with the entire record, the CO concluded that a good faith recruitment effort was not conducted. because the Employer involved its immigration attorney in the recruitment process, as discussed above, noting that Employer failed to assert that its attorney normally interviews or considers on its behalf applicants for job opportunities that do not involve labor certification,
As to the failure of timely delivery to Ms. Jimenez and Ms. Phillips, the Employer was not permitted to blaming the Postal Service was rejected, as it was, itself, responsible for the arrival of notice, as well as its failure to enable to recipients to request rescheduling of the interviews, whose time and place it had designated unilaterally. Moreover, the CO said, the rebuttal did not furnish the missing return receipts for Ms. Valandares and Ms. Foster, and said nothing about the

content of the letters in response to the NOF. Accordingly, the CO denied certification, based on 20 CFR §§ 656.20(b)(3)(i), 656.20(c)(8), 656.21(b)(6), and 656.24(b)(2)(ii).

Appeal. Employer appealed to BALCA by its letter of December 15, 1997, to which it attached parts of the record and quotations from the Code of Federal Regulations.

Discussion

Issue. The only issue referred to BALCA is whether the evidence of record supported the CO's finding that the Employer failed to sustain its burden of proving that it made a sufficient effort to contact U. S. workers, at least some of whom were apparently qualified for the Job Offered.

Burden of proof. As the Employer applied for alien labor certification under an exception to the Act's broad limits on immigration into the United States, the authority to award alien labor certification is subject to the well-established common law principle that, "Statutes granting exemptions from their general operation must be strictly construed, and any doubt must be resolved against the one asserting the exemption." 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896). It follows that establishing entitlement to certification under the Act requires an employer to sustain the burden of proof as to all issues arising in the application.[4] In this case the Employer was required to show that its response to the referral of workers for this position was consistent with the requirement that it acted in good faith in the recruitment process.

Analysis and Conclusion. The text of the Employer's letter was the following:

> Please be advised that we tried to reach you by phone on numerous occasions but have failed to reach you.
> Please come to our Office on Tuesday 8/19/1997 at - pm for interview
> If you are not interested, please let us know.

The time of the appointment was inserted in each letter, and appears to have allowed for a one-

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[4] Because the denial of alien labor certification was based on the Employer's failure to sustain its burden of proof, the Panel observes that labor certification is a privilege that the Act expressly confers by giving favored treatment to a limited class of alien workers, whose skills Congress seeks to bring to the U. S. labor market in order to satisfy a perceived demand for their services. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). The scope and nature of the grant of this statutory privilege is indicated in 20 CFR § 656.2(b), which quoted and relied on § 291 of the Act (8 U.S.C. § 1361) to implement the burden of proof that Congress placed on certification applicants: "Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... ." The legislative history of the 1965 amendments to the Immigration and Nationality Act establishes that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334.

half hour job interview. AF 59, 66, 71, 88, 93, and 109. The record indicates that the letter of notification was delivered to Ms. Phillips by certified mail August 18, 1997, on the day before the day the interview was to take place, and to Ms. Jimenez on August 28, 1997, more than a week after the interview was to have occurred. AF 58, 90. The Employer did not establish the dates when the letters were delivered by certified mail to Ms. Bond, Ms. Foster, Ms. Fraser, and Ms. Valladares. The date of certified mail delivery to Ms. Bond was not proven. While delivery to Ms. Fraser's address was indicated, neither the date nor proof that she, herself, actually received the letter was proven. There was no proof that the letter was delivered by certified mail at the addresses of Ms. Foster and Ms. Vallandares. AF 58, 73, 89, 90, 94, 110.

Aside from the chilling impact of counsel's involvement in the recruitment process, the NOF correctly found that the Employer's evidence did not demonstrate that at least two of the letters were delivered at all. Other evidence of record proved that one applicant was rejected on the sole grounds that she failed to attend the interview, even though she never received notice of the time and place of the interview that the Employer had scheduled.
Moreover, the Panel's examination of the Appellate File indicates that the CO's finding that the Employer's rejection of qualified U.S. workers was contrary to 20 CFR § 656.20(c)(8) even though the U.S. workers did meet the major job requirements and in some instances were better qualified than the Alien for this position.[5] As the Employer was obliged to investigate their qualifications for the position, the failure to establish that it did so is a material defect in the recruitment process. **Gorchev & Gorchev Graphic Design**, 89 INA 118 (Nov. 29, 1990)(*en banc*); **The First Boston Corp.**, 90 INA 059 (Jun. 28, 1991). Since the Employer failed to established that it contacted Ms. Foster and Ms. Vallandares, its rejection of them on grounds that they failed to appear at the scheduled interviews violated 20 CFR § 656.21(b)(7), it indicated that the job opportunity was not open to any qualified U. S. worker under 20 CFR § 656.20(c)(8), and it supported the inference that the Employer failed to recruit in good faith.

Summary. It is well established that a presumption that the employer is required to recruit in good faith is implicit in the regulations. **H. C. LaMarche Enterprises**, 87 INA 607(Oct. 27, 1988). Even if the Employer's failure to deliver its interview notices in a timely fashion was inadvertent or was due to some omission of the Postal Service, certification was properly denied. **Spellman High Voltage Electronic Corp.**, 93 INA 273 (Jun. 27, 1994).[6] As the Certifying Officer's denial of certification is affirmed for the reasons discussed above, the following order will enter.

Order

The Certifying Officer's denial of labor certification is hereby Affirmed.

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[5] As the NOF failed to address the Alien's qualifications prior to going to work for the Employer, the minimum qualifications issue is not before the Panel and has not been considered.

[6] **Photo Medium 16P, Ltd.**, 92 INA 316 (Nov. 8, 1993), is particularly relevant to the facts of this case.

For the panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

SERVICE SHEET

Case No.: 98 INA 184
PRISCO'S VIDEO TV & APPLIANCE, INC., Employer,
TARYN R. SIMOES, Alien.

Title : Decision and Order

I certify that on , 1998, the above-named document was mailed to the last known address of each of the following parties and their representatives:

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BALCA VOTE SHEET

Case No.: 98 INA 184
PRISCO'S VIDEO TV & APPLIANCE, INC., Employer,
TARYN R. SIMOES, Alien.

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Jarvis			
Huddleston			

Thank you,

Judge Neusner
Date: November 23, 1998